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INDIRA GANDHI MUTHO v. KETUA POLIS NEGARA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CIVIL SUIT NO: WA-21NCVC-90-10-2020]
7 OCTOBER 2021

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Abstract – *The police and for that matter the Inspector General of Police, upon the issuance of a warrant of committal or a mandamus order by the court for them to apprehend and commit a person to prison, has a duty to execute the same, and their failure to do so may support or even justify an action in tort against them for nonfeasance in public office. It follows that such a tortious action may not be seen as scandalous frivolous or vexatious, or as having not disclosed any reasonable cause of action, and thus, may not be struck off as being an abuse of process under O. 18 r. 19 of the Rules of Court 2012.*

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CIVIL PROCEDURE: *Striking out – Action – Tort of nonfeasance in public office – Omission by authorities to execute warrant of committal pursuant to decision of Federal Court – Whether action obviously unsustainable – Whether frivolous, scandalous, vexatious or abuse of process – Whether plaintiff could suffer great prejudice if claim struck out – Whether parties should be allowed opportunity to ventilate case in trial with witnesses and production of documentary evidence – Whether plain and obvious case for summary disposal – Rules of Court 2012, O. 18 r. 19(1)*

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TORT: *Nonfeasance – Nonfeasance in public office – Failure to perform statutory duty – Omission by authorities to execute warrant of committal pursuant to decision of Federal Court – Whether applies only to performance of public duties – Whether extended to orders issued by court of law – Whether action obviously unsustainable – Whether plain and obvious case for summary disposal – Government Proceedings Act 1956, ss. 5 & 7(3) – Rules of Court 2012, O. 18 r. 19(1)*

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The plaintiff and Pathmanathan were married under the Law Reform (Marriage and Divorce) Act 1976 and had three children. On 11 March 2009, the latter converted to Islam and had unilaterally converted their three children to Islam and went on to obtain a custody order in respect of the three children from the Syariah High Court ('Syariah Court'). On the other hand, the plaintiff, who turned to the civil court, was granted custody of the three children from the High Court of Malaya in Ipoh ('HC'), whilst Pathmanathan obtained visitation rights. The plaintiff also separately filed and obtained an order for divorce. Despite the grant of custody order by the HC,

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Pathmanathan did not surrender the youngest daughter ('PD') to the plaintiff, resulting in the issuance of two orders against Pathmanathan by the HC: (i) an order that Pathmanathan be committed to prison until the contempt against the custody order was purged by the delivery of PD to the plaintiff ('committal order'); and (ii) an order pursuant to s. 53 of the Child Act 2001 directing the court bailiff and the second defendant to conduct a search, retrieve PD from Pathmanathan and return her to the plaintiff ('recovery order'). The first defendant did not direct the execution of the committal order and the recovery order by the police, taking the stance that the police were faced with two conflicting custody orders whereby executing the custody order of the HC would cause him to be in contempt of the Syariah Court order. Dissatisfied with the first defendant's stance, the plaintiff applied to the HC for a judicial review under O. 53 of the Rules of Court 2012 ('ROC') for an order of *mandamus* to compel the first defendant to execute and enforce the committal order and the recovery order. The HC issued a *mandamus* order against the first defendant to compel the execution of the warrant of committal, or the committal order and the recovery order ('*mandamus* order') but the decision was overturned by the Court of Appeal. However, on further appeal, the Federal Court affirmed the HC's decision and held that an order of *mandamus* could be directed towards the first defendant to compel him to command the execution of the warrant of committal when he had demonstrated a refusal to execute or command the execution of the committal order by the second defendant. The Federal Court also ordered that the HC to monitor the progress of the execution of the warrant of committal against Pathmanathan. Despite the *mandamus* order, Pathmanathan had not been apprehended to be committed to prison, and neither had PD been returned to the plaintiff.

The plaintiff, in October 2020, proceeded to institute a writ action against the defendants claiming, principally, that the first defendant had committed the tort of nonfeasance in public office on the basis that he had failed and omitted to execute the warrant of committal for the committal order and the recovery order pursuant to the decision of the Federal Court. The defendants sought to strike out the plaintiff's writ and statement of claim under O. 18 r. 19(1)(a), (b) and (d) of the ROC on the grounds that: (i) the claim amounted to a multiplicity of proceedings; (ii) the plaintiff had wrongly instituted this action through a writ when, at the same time, the progress of the execution of the warrant of committal against Pathmanathan under the plaintiff's judicial review application was still being monitored by the HC; and (iii) the remedies sought by the plaintiff in the writ and statement of claim were not related to the defendants' alleged wrong. Over and above these three, the more fundamental objection raised by the defendants was on the validity of the cause of action of the tort of misfeasance initiated by the plaintiff against the defendants.

Held (dismissing application for striking out with costs):

(1) The decision of the Federal Court only allowed the *mandamus* order to be issued against the first defendant in respect of executing the committal order and not the recovery order. Hence, the cause of action of nonfeasance concerning the failure of the first defendant to execute the recovery order is a non-starter and could not be sustained. However, the cause of action in respect of the committal order survived and was unaffected. (paras 27 & 28)

(2) Nonfeasance in public office is essentially a tortious failure to act by the Government or a public officer. It concerns the omission to perform a required duty or the failure to act when a duty to act existed. This liability is predicated on the existence of a duty to act. Duty is usually the central concern in actions for public nonfeasance, but not in the instant case. The presence of a duty could not be denied when the terms of the committal order and the *mandamus* order, *vis-à-vis* the defendants, could not be any clearer. The common law tort of nonfeasance, being actionable in this country, any objection against the basis of this suit, thus, could not be sustained. Nor could it be challenged on the basis of the Government Proceedings Act 1956 ('GPA'), given that the common law tort of nonfeasance exists alongside the statutory liability of the tort of neglect by a public officer envisaged under s. 5 of the GPA. (para 50)

(3) A mere failure by a public authority to exercise its duty will not attract liability of nonfeasance unless it is clearly specified under the law. The GPA, particularly ss. 5 and 7(3), create a liability which does not exist at common law *ie*, the liability for acts of nonfeasance on the part of the Government in the exercise of public duties. Section 5 of the GPA states in plain terms the general rule that the Government is liable for any neglect committed by a public officer in tort and is liable in the same manner and to the same extent as that of a principal, being a private person for the wrong by his agent. Section 7 of the GPA, a saving provision, effectively qualifies the general provisions of s. 5 on the general tort liability. It however applies only to the performance of public duties. It does not extend to the duty imposed on the defendants in this case, even if the *ejusdem generis* rule of interpretation is applied. Section 5 states that such liability in tort will be incurred when any public officer commits any wrongful act, neglect or default in pursuance of a duty imposed by law. This is crucial, for the statute does not expressly or impliedly state that the tort of nonfeasance can only be actionable if the said duty was in the nature of a statutory duty. (paras 33, 37, 38, 39 & 41)

(4) The suit disclosed a reasonable cause of action as the tort of nonfeasance under Malaysian law is also recognised under s. 5 of the GPA. Nonfeasance in public office is actionable not only if the duty is statutory in nature but also, and probably even more so, if it arises from an order of court, which in this case is the committal order as well as the *mandamus* order, as affirmed by the Federal Court. The existence of this tort of nonfeasance in the instant case was wholly congruent with the prevailing law. (paras 44 & 46)

(5) The common law tort of nonfeasance is valid and actionable in this country. At any rate, s. 5 of the GPA states that liability for wrongful neglect by a public officer may also be attributed to the Government, thus recognising not only liability for neglect or nonfeasance by a public officer, but also the vicarious liability of the Government in such a situation. The tort of nonfeasance which concerns 'the exercise of public duties' as defined in s. 7 of the GPA, is subject to the provisions stated therein. The facts in the instant suit do not come within the ambit of s. 7. Sections 5 and 7 of the GPA do not state that the public duty in question must be statutory in nature. The former speaks of a duty imposed by law. This must extend to orders issued by the court of law, such as the committal order and the *mandamus* order, which directed that the first defendant execute the warrant of committal. In any event, the public duty imposed on the first and second defendants were enacted in s. 20 of the Police Act 1967. (paras 55-58)

(6) There were material factual disputes as to the relevant efforts and steps that had been taken by the defendants toward the enforcement of the committal order, including as to the nature and extent of the same. There are obvious conflicting averments from all the parties which require this dispute to be duly ventilated in court with reference to documents and witnesses as necessary. This meant that the suit was not a plain and obvious case to be struck out at this early stage. (para 68)

(7) The plaintiff in the judicial review was granted the *mandamus* in respect of the committal order, which was affirmed by the Federal Court. However, that did not bar the plaintiff from instituting a civil claim to seek damages for the loss she claimed to suffer as a result of the alleged nonfeasance of the defendants in respect of the *mandamus* order and the committal order. When a cause of action raised is markedly different, the argument on multiplicity of proceedings is likely to be unmeritorious. The cause of action here, the tort of nonfeasance in public office, was one that had never been pleaded in any proceedings before. Whilst the facts in this writ action and the judicial review proceedings might well be similar in many respects, the causes of actions and remedies sought in the two proceedings are different. The whole objectives are different. (paras 70, 71 & 73-75)

(8) The defendants' assertion that that it was wrong for the plaintiff to institute this suit since the HC was still monitoring the *mandamus* order issued for the first defendant to execute the warrant of committal against Pathmanathan in the plaintiff's judicial review application and that the remedy sought in this action should be made in that judicial review proceeding was incorrect. The plaintiff was within her rights in choosing to commence this tort action and claim for damages instead of instituting a contempt proceedings for an alleged non-compliance with the *mandamus* order and the committal order. (paras 76-78)

(9) It was erroneous to contend that there was no causal link between the remedy sought by the plaintiff against the defendants and the tort claimed to have been committed by them. PD was taken away in 2010. That then obviously nothing had to do with the defendants. But the issuance of the committal order (and recovery order) and subsequently the *mandamus* order had since brought the first and second defendants into the picture. There was a nexus between Pathmanathan being at large and concerns on the part of her mother, of PD's safety and well-being as the child who had been taken away by her father, the very incident which defines the entirety of the rest of the instant suit. It could not therefore be said that the plaintiff's assertion that, if not for the alleged failure of the first defendant to arrest Pathmanathan, the plaintiff would not have still been suffering the absence of PD and not have her back, to be without basis. This could not be a reason to have the claim struck out, even if it appears weak to the defendants. The onus was on the plaintiff to adduce evidence to prove her case. (paras 81 & 82)

(10) There was nothing so obviously or so conspicuously unsustainable about the pleadings of the plaintiff, even when affidavit evidence was examined for the purposes of limbs (b) and (d) of O. 18 r. 19(1) of the ROC. There was nothing frivolous, scandalous or vexatious about them, nor would they amount to an abuse of process. This case was one which was far from being a plain and obvious case, and which was accordingly entirely unsuited for summary disposal by way of striking out under O. 18 r. 19(1) of the ROC. The defendants had not successfully established their case for the striking out and failed to satisfy this court that a striking out of the suit is justified. (paras 83 & 85)

Case(s) referred to:

Affin Bank Bhd v. Eye Bee Sdn Bhd [2005] 1 LNS 291 HC ***(refd)***

American Cyanamid v. Ethicon Ltd [1975] AC 3967 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Cowley v. Newmarket Local Board [1892] AC 345 ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***
Indira Gandhi Mutho v. Ketua Polis Negara [2016] 5 CLJ 353 FC ***(refd)***
Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***
KMS Builders Sdn Bhd v. Hazama Corporation [2002] 8 CLJ 553 HC ***(refd)***
Knowles v. Roberts (1888) 38 Ch D 263 ***(refd)***
Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd [2013] 8 CLJ 329 CA ***(refd)***
Municipality of Pictou v. Geldert [1893] AC 524 ***(refd)***
New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC ***(refd)***
Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors [2017] 9 CLJ 543 CA ***(dist)***
See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(foll)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 1 LNS 133 PC ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:
Child Act 2001, s. 53
Federal Constitution, art. 5(1)
Government Proceedings Act 1956, ss. 5, 7(1), (2), (3)
Police Act 1967, s. 20(3)
Rules of Court 2012, O. 18 rr. 19(1)(a), (b), (d), (2), O. 53

For the plaintiff - Rajesh Nagarajan, Sachpreetraj Singh Sohanpal & Pavitra Loganathan; M/s Raj & Sach
For the defendants - Andi Razalijaya A Dadi & Safiyyah Omar; DPPs

Reported by S Barathi

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is an application filed by the defendants under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 to strike out the plaintiff's writ and statement of claim. The hearing was conducted by way of remote communication technology *via* Zoom. At its conclusion, I declined the application and highlighted the main grounds for the dismissal. This judgment contains the full reasons for the decision.

A **Key Background Facts**

[2] A little bit of history is apposite. The plaintiff married one Pathmanathan a/l Krishnan on 10 April 1993 under the Law Reform (Marriage and Divorce) Act 1976. They have three children. On 11 March 2009, the latter converted to Islam and was said to have thereafter
B unilaterally converted their three children to Islam. On 29 September 2009, Pathmanathan obtained a custody order in respect of the three children from the Syariah High Court in Perak Darul Ridzuan.

[3] The plaintiff however turned to the civil court, and on 11 March 2010
C was also granted custody of the three children from the High Court of Malaya in Ipoh, whilst her former husband obtained visitation rights. Their children, Tevi Darsiny, Karan Dinish and PD are now about 23, 22 and 12 years old, respectively.

[4] The plaintiff also separately filed a petition for divorce against
D Pathmanathan at the High Court of Malaya in Ipoh. The court granted an order for the divorce of the two on 8 August 2012.

[5] Despite the custody order granted by the Ipoh High Court, Pathmanathan did not surrender PD, their youngest daughter to the plaintiff. This then resulted the Ipoh High Court, on the plaintiff's application, to issue
E two orders against Pathmanathan on 30 May 2014. The first was an order that Pathmanathan be committed to prison until the contempt against the custody order was purged by the delivery of PD to the plaintiff ("the committal order"), and the other was an order pursuant to s. 53 of the Child Act 2001 directing the court bailiff and the second defendant to
F conduct a search, retrieve PD from Pathmanathan and to subsequently return her to the plaintiff ("the recovery order").

[6] The first defendant however did not direct the execution of the committal order and the recovery order by the police as he had taken the stance that the police were faced with two conflicting custody orders, one
G issued by the Syariah High Court of Perak Darul Ridzuan in favour of the father and the other granted by the High Court of Malaya in Ipoh to the opposite effect. Thus, the first defendant decided that to execute the custody order of the High Court of Malaya in Ipoh that would cause him to be in contempt of the order from the Syariah High Court of Perak Darul Ridzuan.

H **[7]** Dissatisfied with the first defendant's stance, the plaintiff applied to the High Court of Malaya in Ipoh for a judicial review under O. 53 of the Rules of Court 2012 to obtain an order of *mandamus* to compel the first defendant, who was named as the respondent, to execute and enforce the committal order and the recovery order. This was allowed on 12 September
I 2014, and the High Court issued a *mandamus* order against the first defendant to compel the execution of the warrant of committal, or the committal order and the recovery order ("the *mandamus* order").

[8] Although this decision on the granting of the *mandamus* order was overturned by the Court of Appeal on 17 December 2014, on a further appeal, this time by the plaintiff, the Federal Court on 29 April 2016 affirmed the High Court's decision and held that an order of *mandamus* could be directed towards the first defendant to compel him to command the execution of the warrant of committal when he had demonstrated a refusal to execute or command the execution of the committal order by the second defendant. The Federal Court also ordered that the Ipoh High Court monitor the progress of the execution of the warrant of committal against Pathmanathan.

[9] Nevertheless, despite the *mandamus* order, Pathmanathan has not been apprehended to be committed to prison, and neither has PD been returned to the plaintiff.

[10] The plaintiff then in October 2020 proceeded to institute a writ action against the defendants claiming principally that the first defendant had committed the tort of nonfeasance in public office on the basis that he had failed and omitted to execute the warrant of committal for the committal order and the recovery order pursuant to the decision of the Federal Court on 29 April 2016.

[11] In their statement of defence, the defendants denied all allegations made by the plaintiff, pleading that the first defendant had put in the requisite efforts and taken all actions necessary to execute the warrant of committal.

[12] The defendants then filed the instant application to strike out the claim of the plaintiff. Hence, the proceedings now before me.

The Law On Striking Out – A Summary

[13] The starting point of reference must be O. 18 r. 19(1) of the Rules of Court 2012 ("the RC 2012") which relevant provisions read as follows:

> 19. Striking out pleadings and endorsements (O. 18 r. 19)
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> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible on an application under subparagraph (1)(a) ...

[14] The defendants premised their applications on limbs (a), (b) and (d). Thus it was stated that the claim by the plaintiff disclosed no reasonable cause of action, was frivolous, vexatious and otherwise tantamount to an abuse of court process.

[15] The leading authority on O. 18 r. 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, and in particular, the following part of the judgment of Mohamed Dzaiddin SCJ (later Chief Justice):

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 Rules of the High Court) (*Hubbuck v. Wilkinson*) (*supra*). The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[16] It is therefore well-established that the power of the court to strike out under the four grounds of O. 18 r. 19(1) is to be exercised when it can clearly be determined that a claim or answer is *prime facie* obviously unsustainable (see also the Court of Appeal decision of *Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd* [2013] 8 CLJ 329; [2013] 4 MLJ 520). It is also only to be invoked sparingly (see *Affin Bank Bhd v. Eye Bee Sdn Bhd* [2005] 1 LNS 291; [2005] 7 MLJ 1).

[17] It is equally well-settled that as for limb (a), and as stated in O. 18 r. 19(2) above, examination could only be made of the pleadings, not the affidavits evidence, but where the application is premised on more than one ground under O. 18 r. 19(1), like in the present case, the court should ignore the affidavits affirmed in relation to the other grounds when dealing with limb (a) which ought to be considered first, before examining the affidavit evidence under the other limbs (see *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 AMR 385).

[18] The court is as such perfectly entitled to examine the law and available evidence in detail to ascertain whether a striking out is warranted (see *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 1 LNS 133; [1975] 2 MLJ 1 and *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16).

[19] It is equally clear, as it is practical that the situations that could fall within the categories under limb (d) are never closed given the variety of circumstances arising from the facts of each particular case. The categories of cases where the process of the court could be abused are varied, as they are numerous. They are non-exhaustive (see *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637).

[20] The Federal Court more relatively recently in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 2 MLRA 263 further reaffirmed the position and held:

> [25] The principles for striking out pleadings pursuant to O. 18 r. 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see: *Bandar Builder* (*supra*), *Hubbuck & Sons Ltd v. Wilkinson, Heywood Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).
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> [26] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* (*supra*) are, *inter alia*, as follows: (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule; (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.; (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and (e) The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
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> [28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* (*supra*) is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', i.e. the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.
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> [29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 at p 407:
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> > ... The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this

A stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

B **[21]** As such, for the ground under limb (a), the pleadings must disclose some cause of action fit to be tried. Where it is alleged that the claim discloses no reasonable cause of action, the case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1; [1985] 1 MLJ 226 is instructive, as shown in the following passage from the judgment:

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> In an application to strike out pleadings under O. 18 r. 19(1) no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the Statement of Claim disclosed no reasonable cause of action or the Statement of Defence disclosed no
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> D defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable ...

[22] A claim is considered to be scandalous, frivolous or vexatious under limb (b) if it is wholly unnecessary and irrelevant, and in the manner explained in the case of *Harapan Permai Sdn Bhd v. Sabah Forest Industries*

E *Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192 which held that "scandalous" generally refers to matters which improperly causes a derogatory light on someone, usually a party to the action, with respect to moral character, and not just unpleasant allegations. The words "frivolous or vexatious" mean a case which is obviously frivolous or vexatious or obviously unsustainable

F (*Mallal's Supreme Court Practice*, 2nd edn, vol. 1).

[23] In the case of *American Cyanamid v. Ethicon Ltd* [1975] AC 3967, Lord Diplock stated that a claim is not frivolous or vexatious where a serious question to be tried has been raised. Where there are issues of fact and law that require investigation and mature consideration after hearing full

G argument, then it could not be said that the subject matter of the striking out application before the court was frivolous or vexatious.

[24] Although not pleaded in this application by the defendants, a claim may be said to prejudice, embarrass, or delay the fair trial of the action under

H limb (c) where the parties offend against the rules of pleading which have been laid down by law. Thus, if a party introduces a pleading which is unnecessary and which tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading beyond his right (*Knowles v. Roberts* (1888) 38 Ch D 263).

I **[25]** It is, as mentioned, otherwise an abuse of process of the court under item (d) where its process has not been used in a *bona fide* manner and has been abused.

Analysis And Findings

[26] The defendants submitted that the claim of the plaintiff ought to be struck out because of three reasons. The first is that the claim amounts to a multiplicity of proceedings. Secondly, the plaintiff had wrongly instituted this action through a writ when at the same time the progress of the execution of the warrant of committal against Pathmanathan under the plaintiff's judicial review application is still being monitored by the Ipoh High Court. The third ground is that the remedies sought by the plaintiff in the writ and statement of claim are not related to the defendants' alleged wrong. However, over and above these three, the more fundamental objection raised by the defendants is on the validity of the cause of action of the tort of misfeasance initiated by the plaintiff against the defendants.

Mandamus Order Only Concerns The Committal Order

[27] It must first however be made clear that unlike the suggestion made by the plaintiff, the decision of the Federal Court only allowed the *mandamus* order to be issued against the first defendant in respect of executing the committal order and not the recovery order. The following passages from the decision of Raus Sharif PCA (later Chief Justice) for the Federal Court in *Indira Gandhi Mutho v. Ketua Polis Negara* [2016] 5 CLJ 353; [2016] 3 MLJ 141 could not have expressed it any more clearly:

> [26] It was decided in that case that the phrase 'lawful custody of a child' in s. 52(2) of the Child Act includes a person who has been conferred custody by virtue of any written law or by an order of a court including a Syariah Court. Thus in that case, it was held that since there was a custody order by the Syariah High Court giving custody to the ex-husband, the High Court could not possibly issue a recovery order under s. 52 of the Child Act. The Civil High Court could not direct the IGP or his officers to execute the recovery order as both the Syariah High Court order and the Civil High Court order bind the IGP and his officers either way and the execution and performance of one order was impossible without being in contempt of the other.
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> [27] Similarly, in the present case, there are two conflicting custodial orders. One was the Syariah High Court order giving custody of the children to Pathmanathan. The other was the Civil High Court order which gave custody of the children to the appellant. As such, we are of the view that the recovery order should not have been given by the Civil High Court because like the *Viran a/l Nagapan*'s case the pertinent element under s. 52 of the Child Act had not been fulfilled. No order of *mandamus* can be issued when such right is doubtful and not free from any reasonable controversy (see *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ 180b).
>
> [28] Based on the above, the IGP can be excused for not taking any action to enforce the recovery order. The IGP's quandary over the matter is well-founded.

[28] As such, to that extent, I cannot but agree with the defendants that based on the plaintiff's statement of claim, the cause of action of nonfeasance concerning the failure of the first defendant to execute the recovery order is a non-starter and cannot be sustained. However, the cause of action in respect of the committal order survives and is unaffected.

Whether The Tort Of Nonfeasance Actionable In This Suit

[29] Notwithstanding the above-mentioned three points forming the basis of this application, I shall however first address a key overriding argument of the defendants in this application which concerns the cause of action relied on by the plaintiff. The defendants asserted that the claim does not disclose a reasonable cause of action since the cause of action of nonfeasance alleged by the plaintiff does not impose any liability against the first defendant because such liability is not created under any legislation in Malaysia.

[30] Reference in particular was made to the advice of the Privy Council in *Municipality of Pictou v. Geldert* [1893] AC 524, an appeal against a decision of the Supreme Court of Nova Scotia where Lord Hobhouse, delivering the advice of the board expressed his view of the doctrine of nonfeasance when he said:

> By the common law of England which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.

[31] Citing the decision of the House of Lords in *Cowley v. Newmarket Local Board* [1892] AC 345, Lord Hobhouse further stated thus:

> It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed.
>
> The law was laid down by this Board in the case of *Sanitary Commissioners of Gibraltar v. Orfila*, thus: 'In the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a duty towards himself which they negligently failed to perform'.
>
> The question then is, whether any statute has given to private persons the right of action now claimed against this municipality which does not exist at common law.

[32] As such, it is argued by the defendants that in order for the plaintiff to establish a cause of action of nonfeasance in common law, there must be a clear indication in the legislation that liability shall be imposed for the non-performance of a duty.

[33] I do not disagree with this proposition. I agree that a mere failure by a public authority to exercise its duty will not attract liability of nonfeasance unless it is clearly specified under the law. I also agree that the leading authority presently on the doctrine of nonfeasance in public office in Malaysia is the decision of the Court of Appeal in *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors* [2017] 9 CLJ 543 where it was held that the Government Proceedings Act 1956 ("the GPA"), particularly ss. 5 and 7(3) create a liability which does not exist at common law ie, the liability for acts of nonfeasance on the part of the Government in the exercise of public duties.

[34] Vernon Ong Lam Kiat JCA (as he then was), writing for the court, stated as follows:

Liability For Breach Of Statutory Duty

[13] At common law, a statutory duty frequently gives rise to a liability to a civil action (*Bux v. Slough Metals Ltd* [1973] 1 WLR 1358; *London Passenger Transport Board v. Upson* [1949] AC 155). There are three categories of liability arising out of a breach of statutory duty. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there the party can only proceed by action at common law. The third class is where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it (*Wolverhampton New Waterworks Co v. Hawsford* (1859) 6 CB (N.S.) 336, 356).

[14] In this regard, it is pertinent to refer to the provision of ss. 5 and 7 of the GPA 1956 which read as follows:

Liability of the Government in tort

5. Subject to this Act, the Government shall be liable for any wrongful act done or neglect **or default committed by any public officer** in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

Savings of acts done in exercise of public duties

7. (1) Notwithstanding any other provisions of this Act to the contrary no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to

A be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government.

(2) For the purposes of subsection (1) the expression **"exercise of the public duties"** includes:

B (a) the construction, **maintenance**, diversion and abandonment of railways, roads, bridle-paths or bridges;

(b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;

(c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and

C

(d) the maintenance, diversion and abandonment of the channels of rivers and waterways.

(3) **Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence** or trespass in the execution of any works of construction or **maintenance undertaken by the Government in the exercise of the said public duties**.

D

(4) Nothing in this Act shall subject the Government, in its capacity as a highway authority, to any greater liability than that to which a local authority is subject in that capacity.

E [15] In our view, the common law right to bring an action for negligence for breach of statutory duty has been accorded statutory recognition under the GPA 1956; and that the liability which has been established falls under the third class of cases – ie, where the statute (the GPA 1956) creates a liability which does not exist at common law, ie, liability for acts of nonfeasance on the part of the Government in the exercise of its public duties. (emphasis added)

F

[35] The defendants submitted that *Raymond Cheah* (*supra*) indicated that the statute that creates the liability of nonfeasance on the part of public authority is provided under the GPA, which they argued is in relation to the exercise of public duty in maintaining and constructing public roads.

G

[36] As such, given that this present case involves the allegation that the first defendant had committed the tort of nonfeasance by failing to execute the *mandamus* order, which is not a case involving highway authority in exercising its public duty in construction and maintenance of the public road (where the liability of nonfeasance for failing to exercise such duty is stipulated under the GPA), such liability of nonfeasance, according to the defendants is not provided under the GPA and hence does not and cannot form a cause of action against the defendants here.

H

[37] It should I think be made clear that s. 5 of the GPA states in plain terms the general rule that the Government is liable for any neglect committed by a public officer in tort and is liable in the same manner and to the same extent as that of a principal being a private person for the wrong by his agent.

I

[38] Section 7 of the GPA on the other hand, which is heavily relied on by the defendants in their present application to strike out the suit, is a saving provision. It effectively qualifies the general provisions of s. 5 on the general tort liability. As its title reads, it however applies only to the performance of public duties. And as s. 7(2) states, the exercise of public duties refers to matters such as construction and maintenance of roads and highways, drainage, waterways as well as schools, hospitals and other public buildings. It provides in s. 7(1) that only action based on breach of contract is permitted but s. 7(3) also allows any suit for damages or compensation arising out of negligence or trespass.

[39] It is beyond dispute nevertheless that it does not therefore extend to the duty imposed on the defendants in this case, even if the *ejusdem generis* rule of interpretation is applied. In contrast, the facts in *Raymond Cheah* (*supra*) dealt with the issue of maintenance of public road. The liability of nonfeasance found in that case was in relation to the exercise of public duty in maintaining and constructing public road.

[40] The defendants then argued that the plaintiff's claim of nonfeasance is not derived from a breach of statutory duty. It is the alleged non-adherence to the *mandamus* order concerning the committal order and this is not strictly a breach of statutory duty. The duty that was claimed to have been breached by the defendants is one that is imposed by the court of law.

[41] Nevertheless, it bears emphasis that s. 5 states that such liability in tort will be incurred when any public officer commits any wrongful act, neglect or default in pursuance of a duty imposed by law. This is crucial, for the statute does not expressly or impliedly state that the tort of nonfeasance can only be actionable if the said duty was in the nature of a statutory duty.

[42] In any event, the plaintiff's assertion that the duty may be said to be imposed by s. 20 of the Police Act 1967 is also not without merit. The general duties of police officers under the command of the first defendant are provided for under this statutory provision which reads:

20. General duties of police officers

(1) *Every police officer shall perform such duties and exercise such powers as are by law imposed* or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.

(2) Where any duty, power or discretion is imposed or conferred by or under this Act or any other law on a police officer of any specified rank or holding any specified office, such police officer shall, in the performance of such duty or the exercise of such power or discretion, be subject to the orders and directions of any police officer to whom he is directly subordinate, and any such

A last-mentioned police officer, if the occasion arises and he deems it expedient so to do, shall himself perform any such duty or exercise any such power or discretion.

(3) *Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including*:

B

(a) *apprehending all persons whom he is by law authorised to apprehend;*

(b) processing security intelligence;

C (c) conducting prosecutions;

(d) giving assistance in the carrying out of any law relating to revenue, excise, sanitation, quarantine, immigration and registration;

(e) giving assistance in the preservation of order in the ports, D harbours and airports of Malaysia, and in enforcing maritime and port regulations;

(f) *executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority;*

(g) exhibiting information;

E

(h) protecting unclaimed and lost property and finding the owners thereof;

(i) seizing stray animals and placing them in a public pound;

(j) giving assistance in the protection of life and property;

F (k) protecting public property from loss or injury;

(l) *attending the criminal courts and, if specially ordered, the civil courts, and keeping order therein*; and

(m) escorting and guarding prisoners and other persons in the custody of the police.

G

(4) A police officer shall when performing the duties mentioned in paragraph (3)(m) be deemed to be a prison officer, and shall have all the powers, protection and privileges attached to a prison officer.

(emphasis added)

H **[43]** Indeed, Raus Sharif PCA (as he then was) in *Indira Gandhi Mutho* (*supra*) said clearly *vis-à-vis* that s. 20(3) thus:

[34] It can be seen from the above that the duties of a police officer include the execution of warrants. This must include warrants of committal issued resulting from a contempt proceeding. In that light, we I are of the view that on the facts and circumstances of this case the IGP cannot refuse to command his officers to execute the warrant of

committal issued by the civil High Court. Thus, when the IGP declared his intention not to execute the said warrant of committal, an order of *mandamus* can be issued against him.

[44] As such, in my judgment, contrary to the assertions of the defendants, the suit discloses a reasonable cause of action as the tort of nonfeasance under Malaysian law is also recognised under s. 5 of the GPA which provides that the government is liable in tort when any public officer commits any wrongful act, neglect or default in relation to a duty imposed by law. Nonfeasance in public office is in my view actionable not only if the duty is statutory in nature (such as s. 20 of the Police Act 1967) but also, and probably even more so, if it arises from an order of court, which in this case is the committal order as well as the *mandamus* order, as affirmed by the Federal Court.

[45] In this respect, in the context of striking out, the following observation by Nallini Pathmanathan FCJ in *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337 is especially instructive:

> [38] With the greatest respect, the Court of Appeal in the instant appeals appears to have conflated and misapplied the principle that there ought to be no trial by affidavit with the need to examine and ascertain that there is a proper cause of action made out which can proceed to trial. The essence of a striking out application particularly under limb (a) of O. 18 r. 19(1) is that upon an examination of the claim as pleaded in the statement of claim, a whole and coherent cause of action must subsist. A whole and coherent cause of action cannot subsist until and unless all the essential ingredients comprising that cause of action subsist or are made out in the body of the statement of claim. That, in turn, means that it is incumbent upon a court undertaking a striking out exercise to scrutinise a claim purposively such that it is satisfied that *prima facie*, the statement of claim contains a sufficient factual matrix to support each and every ingredient of the cause of action pleaded. The issue of whether or not such a factual matrix is capable of proof is a matter of evidence which must, necessarily, be dealt with by way of oral evidence at trial. However this latter issue is wholly separate and disparate from whether or not the ingredients of a particular cause of action have been made out.

[46] The case of *Tony Pua* (*supra*) is also especially pertinent for it unmistakably manifests that the existence of this tort of nonfeasance in the instant case is wholly congruent with the prevailing law. The lucid explanation by Nallini Pathmanathan FCJ in the following passages is particularly instructive:

> [119] It is therefore abundantly clear that in the natural and ordinary construction of the Interpretation Acts, Parliament intended to apply the definition of "public officer" only to written law. There is nothing apparent in the language of the Interpretation Acts to suggest that Parliament expressly intended to exclude the common law definition of the term. As such, as far as the Interpretation Acts are concerned, the

A common law presumption stands. **The term "public officer" as it is understood under the common law retains its meaning in a suit for misfeasance in public offic**e.

...

[139] **This court in *Keruntum* (above) found no reason to modify the tort in any manner so as to 'suit local circumstances'. We see no reason to depart from the earlier decision**.

[140] **One of the most fundamental reasons why this tort lends itself so suitably to so many jurisdictions is the underlying basis of the tort**. The rationale has been set out succinctly by learned counsel for the appellant and we adopt the same below:

(i) In a legal system based on the rule of law, executive or administrative power may be exercised 'only for the public good' and not for ulterior and improper purposes (see *Three Rivers (*above), p. 7);

(ii) The underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. (see *Odhavji Estate v. Woodhouse* [2003] 3 SCR 263 at para. 30);

(iii) It is regarded as the only tort having its roots and application within public law alone (see *Pyrenees Shire Council v. Day* (1998) 151 ALR 147 at para. 124); and

(iv) There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity (see *Watkins v. Secretary of State for the Home Department And Others* [2006] 2 AC 395 at para. 8). However in the same case Lord Bingham balanced the statement by stating: "On the other hand, it is correctly said that the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not ...

[141] A perusal of the not inconsiderable volume of authority on the subject will disclose that the tort of misfeasance in public office is grounded on the rule of law. Amongst the fundamental aspects of the rule of law is that: The law is supreme over the acts of both government and private persons. That law is one and it is applicable to all. To that end, no man is above the law and all are equal before the law.

[142] It is beyond argument that the rule of law is a fundamental feature of the constitutional framework of this country (see *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545). Further afield in Canada the 'internal architecture' of the Canadian Constitution was explained by the Supreme Court of Canada with regard to the rule of law in *Reference re Secession of Quebec,* [1998] 2 SCR 217. The statements of the court, with respect, resonate strongly in Malaysia, given the basis and structure of our Constitution and the fact that we are a democracy: (emphasis added)

[47] It is of course plain that *Tony Pua* (*supra*) concerns the common law tort of misfeasance in public office. In the instant case however, it is nonfeasance in public office. But the latter exists under Malaysian law for the same reasons that the former is recognised. The Federal Court in *Tony Pua* explained thus:

> [91] It is therefore sufficiently clear that common law and the written law exist as independent streams of law. The common law is "law" for as long as it remains in force. The mechanism for determining whether it remains in force lies in s. 3(1) of the CLA 1956:
>
> > **Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia**, the Court shall
> >
> > (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956; ...
> >
> > Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> [92] By virtue of s. 3(1) of the CLA the 'common law' applicable in Malaysia is capable of amendment, modification and/or abrogation by written law enacted after 7 May 1956.
>
> [93] Applying the foregoing to the current question before us, it follows that the common law tort of misfeasance in public office, which would include the definition of a 'person holding public office' or a 'public officer', is applicable in Malaysia subject to the proviso to s. 3(1) Civil Law Act unless the common law tort has been modified, varied or abrogated by written law.
>
> [94] In other words, the section in its ordinary meaning means that the common law of England as of 7 May 1956 'shall' be applied in Malaysia save for the two express provisions under the section, namely:
>
> (i) Express exclusion, variation or abrogation of the common law of England by Malaysian written law; and
>
> (ii) The proviso to the section which requires that the common law of England only be applied to the extent that: (a) the circumstances of the country and their respective inhabitants permit; and (b) subject to such qualifications as local circumstances render necessary.
>
> [95] It would therefore follow that if there has been abrogation, express or implied, of the tort including the definition of a 'public officer' by written law, then the propositions and case-law stipulated in England and other jurisdictions adopting the tort in like vein are inapplicable in so far as they contradict the abrogated position in Malaysia. As pointed out earlier the application of the tort in itself is not in issue as borne out by its application in a number of cases including *Keruntum* (above), *LBCN*

A *Development Sdn Bhd & Anor v. Pengarah Tanah Dan Galian Selangor & Ors* [2014] 3 CLJ 970 etc. It is the definition of its key ingredient and the ambit of that definition that is in issue here. However, any such abrogation or variation can only be effected by written law.

(emphasis added)

B **[48]** *Tony Pua* confirms that the tort of misfeasance in public office continues to apply in Malaysia in view of the Civil Law Act 1956 and that no statutes have been enacted to have the tort modified let alone abrogated. The Federal Court emphasises that a statute abrogates a common law principle where it expressly states an intention to abrogate that principle, or C where it implicitly abrogates the principle by adopting a scheme that is wholly incompatible with the continued application of the common law principle. None was found in *Tony Pua* in respect of the common law tort of misfeasance in public office. In my view, none has been shown in respect of the common law tort of nonfeasance in public office in the instant case D either, other than the clear provisions of s. 7 of the GPA in respect of the exercise of public duties as defined therein.

[49] Nonfeasance is after all but one of the triumvirates of tortious liability of public officer embedded in common law. The three related concepts have been usefully described in the following terms:

E "Nonfeasance" means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do; "misfeasance" means the improper doing of an act which the agent might lawfully do, or, in other words, it is the performing of his duty to his principal in such a manner as to infringe F upon the rights and privileges of third persons; and "malfeasance" is a doing of an act which he ought not to do at all. (*Owens v. Nichols*, 139 Ga. 475, 77 S.E. 635 (1913); Annot. 20 A.L.R. 97, 99-101 (1922) (supplemented in 99 A.L.R. 408 (1933)).

[50] Nonfeasance in public office, in other words, is essentially a tortious G failure to act by the Government or a public officer. It concerns the omission to perform a required duty or the failure to act when a duty to act existed. This liability is predicated on the existence of a duty to act. Duty is usually the central concern in actions for public nonfeasance. But not in the instant case. The presence of a duty cannot be denied when the terms of the committal order and the *mandamus* order, *vis-à-vis* the defendants, could not H be any clearer. The common law tort of nonfeasance being actionable in this country, any objection against the basis of this suit cannot thus be sustained. Nor can it be challenged on the basis of the GPA, given what has been discussed earlier where the common law tort of nonfeasance exists alongside the statutory liability of the tort of neglect by a public officer envisaged under I s. 5 of the GPA.

[51] There is one other aspect of the GPA that further supports the legitimacy of this tortious liability suit of nonfeasance. It confirms the vicarious liability of the Government for the tort committed by a public officer. The Federal Court in *Tony Pua* (*supra*) explained thus:

> Purposive Interpretation Of The GPA
>
> [163] The GPA was first known as the Government Proceedings Ordinance 1956. It was enacted by the then Federal Legislative Council, a body established under the Federation of Malaya Agreement 1948 under the purview of the British. It was drafted in similar vein to the UK Crown Proceedings Act 1947 ('UK CPA').
>
> [164] Section 2(1) of the UK CPA bears essential similarities to s. 5 of the GPA. It provides that the "Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity it would be subject".
>
> [165] And in relation to torts committed by the Crown's servants or agents, it allows for the Crown to be sued *inter alia* for the acts or omissions of the Crown's servant or agent only if such act or omission would have given rise to a cause of action in tort against that servant or agent or his estate. Although phrased in the negative, the concept of vicarious liability is clear in that liability affixes to the Crown in situations where the servant or agent could personally be sued in tort.
>
> [166] In essence, s. 2 allowed the Crown to be sued directly for the tortious acts of its servants or agents.
>
> [167] In practice, the servants or agents extended to a list of government departments which were 'authorised' departments for the purposes of the Act. This included the Cabinet office and all the Ministries in the UK Government. This meant that the Crown remained vicariously liable for the acts and omissions of its Ministers.
>
> [168] The rationale of the GPA, like the UK CPA is also to statutorily establish vicarious liability *vis-à-vis* the Government in respect of the acts or omissions of its officers, subject to the express provisos or other statutory provisions excluding such liability in specific circumstances.
>
> [169] Once it is accepted that the purpose of the GPA is to establish vicarious liability on the part of the Government (which is borne out by the express provisions of s. 5) it follows that importing the definition of 'public officer' in s. 3 of the Interpretation Acts would render the underlying purpose of the GPA meaningless. In other words, despite express provisions creating such vicarious liability, this may be circumvented by importing a definition from another statute, namely the Interpretation Acts. Any construction which allows for the express circumvention of the very purpose for which the statutory provision was established is perverse and cannot be sustained. Therefore s. 3 of the Interpretation Acts cannot be imported to construe s. 5 of the GPA.

[52] On the clear authority of the Federal Court decision in *Tony Pua* (*supra*) it can therefore be said that nonfeasance, like misfeasance as discussed in *Tony Pua* is a common law tort which is actionable under the law. The analysis in *Raymond Cheah* (*supra*) is however in relation to nonfeasance in the nature of a statute (the GPA) which creates a liability which does not exist at common law. This was explained to be a liability for nonfeasance on the part of the Government in the exercise of its public duties, as the term is described in s. 7 of the GPA, as discussed earlier.

[53] The nonfeasance in the instant case does not concern the exercise of public duties in the context of s. 7 of the GPA such as in respect of road maintenance, which was the situation in *Raymond Cheah*. The tort of nonfeasance in the case before me is the common law tort unmodified by statute (such as the GPA). There is no necessity to identify a statute which creates a liability for a breach as a *sine qua non* for the action in nonfeasance to be valid and actionable. For I reiterate that nonfeasance in common law is a complete tort, at least in the nature of the one in this case.

[54] The following propositions relevant to the instant suit may be distilled from the authorities, particularly *Tony Pua* and *Raymond Cheah*:

[55] First, the common law tort of nonfeasance is valid and actionable in this country. Although nonfeasance is ruled by the Court of Appeal in *Raymond Cheah* to be created under s. 5 of the GPA, the tort may be said to be already existing as part of Malaysian law on the basis of the determination by the Federal Court in *Tony Pua* which recognises the tort of misfeasance in public office which survives, pursuant to the Civil Law Act 1956. In addition the subservience to the rule of law as the jurisprudential basis for the tort of public misfeasance must equally apply to the tort of public nonfeasance, and is at the same time also entirely in accord with s. 5 of the GPA.

[56] Secondly, at any rate, s. 5 of the GPA states that liability for wrongful neglect by a public officer may also be attributed to the Government, thus recognising not only liability for neglect or nonfeasance by a public officer, but also the vicarious liability of the Government in such a situation.

[57] Thirdly, the tort of nonfeasance which concerns "the exercise of public duties" as defined in s. 7 of the GPA, like in *Raymond Cheah*, is subject to the provisions stated therein. The facts in the instant suit do not come within the ambit of s. 7.

[58] Fourthly, ss. 5 and 7 of the GPA do not state that the public duty in question must be statutory in nature. The former speaks of a duty imposed by law. Surely, this must extend to orders issued by the court of law, such as the committal order and the *mandamus* order, which directed that the first

defendant execute the warrant of committal. I emphasise that nonfeasance is defined in the *Oxford Dictionary of Law* (7th edn) as failure to perform an act required by law. In any event, the public duty imposed on the first and second defendants in the instant case is enacted in s. 20 of the Police Act 1967 as referred to earlier.

[59] What then is a cause of action? It has long been settled that as held in *Letang v. Cooper* [1965] 1 QB 222 that a reasonable cause of action involves a factual situation the existence of which entitles a party to obtain a remedy against another party from the court. In that case, where a car driven by the defendant reversed over the legs of the plaintiff who was sunbathing on a piece of grass in a parking area, the English Court of Appeal in the judgment written by Diplock LJ decided that where the damage was caused by an action which was not intentional, an action for the trespass to the person could not be pursued, but should instead have been commenced under the tort of negligence (which was however by then time-barred).

[60] In *Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393 "cause of action" was explained in the following fashion:

> With respect, I think we should first ask ourselves what a "cause of action" is. *Stroud's Judicial Dictionary* 5th edition Vol. 1 page 378 gives twenty separate interpretations of this expression. I think the first is appropriate:
>
> > A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher M.R., *Read v. Brown*, 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643).

[61] And importantly, in order to determine whether a reasonable cause of action exists, the court must assume the truth of the primary facts alleged by the plaintiff in the statement of claim. In *Tuan Hj Ishak Ismail* (*supra*), Mahadev Shankar JCA stated:

> ... But O. 18 r. 19(1)(a) only requires that the Court assume the truth of the "primary facts" alleged. It does not require that the petitioner's inferences from those facts should also be assumed to be true, unless those inferences necessarily follow. Nor is the Court obliged to accept the "conclusions" alleged or the relief sought unless the factual basis for those conclusions or relief has been pleaded ...

[62] In my judgment, a scrutiny of the pleadings in the claim of the plaintiff in this case cannot but readily disclose the existence of a reasonable cause of action, more so as the tort of nonfeasance as alleged herein is actionable in the context of this suit.

[63] I think it is not disputed as I have stated that nonfeasance is the failure or omission to perform an obligatory or compulsory act. It is a tort of intentionally neglecting to carry out a duty which is an obligation and because of the failure to perform the duty, someone is harmed or injury has been caused. Here, the plaintiff has raised a number of issues that she asserted warranted a full trial.

[64] These questions are whether the defendants have committed the tort of nonfeasance in public office by failing to enforce the *mandamus* order, including failing to arrest Pathmanathan pursuant to the committal order, whether the first defendant had any role in the decisions which omitted to execute the warrant of committal, whether the first defendant had the legal obligation to adhere to committal order and the *mandamus* order and to oversee the second defendant's investigations and other activities in relation to the execution of the warrant of committal, whether the first defendant had misconducted himself by failing to exercise the powers which were conferred on him for the benefit of the public with intent and/or recklessly to injure the plaintiff and/or in the knowledge that he was acting in defiance of the committal order and the committal order, whether he had knowingly or recklessly failed to take all necessary steps to apprehend Pathmanathan, whether the second, third and fourth defendants are vicariously liable for the matters aforesaid, whether the conduct of the defendants had directly or indirectly caused and/or extended the separation between the plaintiff and her youngest daughter, PD, and whether the conduct of the defendants and their failure to act had directly or indirectly enabled Pathmanathan to evade capture.

[65] The plaintiff also averred that the first defendant, in a statement to the media on 27 January 2020, stated that he was aware of Pathmanathan's location and was working on a 'happy ending' for the plaintiff. This statement, according to the plaintiff, made it clear that the first defendant had not proceeded to arrest Pathmanathan and hand PD over to the plaintiff despite evidently being aware of the whereabouts of Pathmanathan.

[66] For all these, the plaintiff seeks damages under the tort of nonfeasance against the first defendant and claims vicarious liability against the other three defendants. The first and second defendants in particular have, according to the plaintiff, failed to give effect to the committal order for more than six years. The plaintiff thus now claims to have been unlawfully separated from PD, and she has suffered pain and anxiety as a result of her constant worry over the safety and well-being of her youngest daughter.

[67] Whether the plaintiff can succeed in her claim under the tort of nonfeasance is a different matter and is not the concern of the court at this juncture. It is an actionable tort in this case but it is axiomatic that it is for the plaintiff to adduce documentary evidence and witnesses during trial to prove her case on a balance of probabilities.

Material Factual Disputes Do Not Justify Striking Out

[68] In any event based on the affidavits I am satisfied that there are material factual disputes as to the relevant efforts and steps that had been taken by the defendants towards the enforcement of the committal order, including as to the nature and extent of the same. There are obvious conflicting averments from all the parties which require this dispute to be duly ventilated in court with reference to documents and witnesses as necessary. This alone means that the suit is not a plain and obvious case to be struck out at this early stage.

[69] The key point is, and as well-established by case law authorities, as long as the claim discloses some cause of action or raises some questions to be tried then the claim should not be struck out. And in all situations, it is well-settled that a claim should only be struck out under O. 18 r. 19 if it is plainly and obviously unsustainable, and that a claim which is considered weak or unable to succeed at trial should not without more be a ground to be struck out.

Whether There Is Multiplicity

[70] In addition, I find that the contention of the defendants that this suit results in a multiplicity of proceedings in view of the existence of the judicial review proceedings at the High Court in Ipoh which is still monitoring the progress of execution of the committal order to be without merit. This is primarily because both the cause of action of the tort of nonfeasance and the remedy of damages in this suit have never been raised before in any other proceedings. The plaintiff in the judicial review was granted the *mandamus* in respect of the committal order, which was affirmed by the Federal Court.

[71] That does not however bar the plaintiff from instituting a civil claim like presently to seek damages for the loss she claims to suffer as a result of the alleged nonfeasance of the defendants in respect of the *mandamus* order and the committal order. This is the position even though damages may also be claimed in a judicial review proceedings, because the basis for that claim is not a tort claim. A claim under the tort of nonfeasance, or any form of tort for that matter, even against a public authority, cannot be instituted in a judicial review case.

[72] In the case of *KMS Builders Sdn Bhd v. Hazama Corporation* [2002] 8 CLJ 553 the High Court refused to strike out a suit on the ground of duplicity of proceedings – one a writ, and another an originating summons, and explained in the following terms:

> It is obvious that the argument raised by the defendant of duplicity of proceedings is devoid of merit, because the cause of action by the defendant against the plaintiff in the writ action is markedly different from the orders prayed for by the plaintiff against the defendant herein. Although in the writ action, the plaintiff would be required to stay the proceedings therein there is an overlap of issues to be decided, the plaintiff in the writ action is merely thwarting further proceedings against a claim for monies by the defendant whereas in the OS, the plaintiff is seeking declarations on the effect of the Arbitration Clause and appointment of arbitrator pursuant to s. 12 of the Arbitration Act 1952. It is clear as night and day that the OS and writ action are totally different in nature and there is no duplicity of proceedings. In the case of *The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828 the court held:
>
> > (5) The basis of multiplicity of actions for the motion is devoid of merit since the issues were all different and they were between either of the respondents in the hearing of the petition (see p. 219C).

[73] The High Court also made it clear that although there are some ancillary issues which overlap, this alone will not entitle the defendants to succeed in striking out. Thus, when a cause of action raised is markedly different, the argument on multiplicity of proceedings is likely to be unmeritorious, like presently.

[74] The cause of action here, the tort of nonfeasance in public office as introduced by the plaintiff is one that has never been pleaded in any proceedings before. In this tort of nonfeasance action, the plaintiff is claiming for declarations and for damages allegedly suffered since the committal and recovery orders were pronounced by the Ipoh High Court on 30 May 2014.

[75] In contrast, the application for the Judicial Review No. 25-13-06-2014 is an application made by the plaintiff to ensure the first defendant adheres to the committal order and the recovery order. The *mandamus* order issued by the High Court was affirmed by the Federal Court in relation to the committal order. As such whilst the facts in this writ action and the judicial review proceedings might well be similar in many respects, the causes of actions and remedies sought in the two proceedings are different. The whole objectives are different. The judicial review was to compel the first defendant to execute the committal and recovery orders, and the present writ is more of a consequential relief, which sought to declare the first defendant

committed the tort of nonfeasance and the other defendants being vicariously liable therefor, as well as to recover damages said to be suffered by the plaintiff against them for the nonfeasance.

Judicial Review Proceedings Are Still Being Monitored At The Ipoh High Court

[76] The defendants further submitted that it was wrong for the plaintiff to institute this suit since the Ipoh High Court is still monitoring the *mandamus* order issued for the first defendant to execute the warrant of committal against Pathmanathan in the plaintiff's judicial review application. The plaintiff is actually bringing an action for the alleged failure of the first defendant to enforce the *mandamus* order to execute the committal order against Pathmanathan. They repeated the argument that the remedy sought in this action should be made in that judicial review proceeding. This renders the plaintiff's action as scandalous, frivolous or vexatious or is an abuse of process.

[77] This argument is not dissimilar to the multiplicity point. But I do not think this assertion is correct. The crux of the instant suit for the tort of nonfeasance is for the plaintiff to claim damages for the loss and suffering she claims to have suffered due to the alleged inaction of the defendants. She had already initiated a judicial review action which resulted in the *mandamus* order. Further the Federal Court in *Indira Gandhi Mutho* merely ordered that the High Court monitor the progress of the execution of the warrant of committal against Pathmanathan. The substantive judicial review action has long been completed by the High Court.

[78] These are different proceedings with a clear distinction in objectives. It is not about the plaintiff attempting in an indirect fashion to seek the enforcement of the *mandamus* order. The plaintiff in fact could have instead applied to institute contempt proceedings for an alleged non-compliance with the *mandamus* order and the committal order. The learned SFC even argued that this was what she should have done. But she instead chose to commence this tort action and to claim for damages, which I reiterate is entirely within her rights to do so. Fundamentally, there is and can be no bar to the plaintiff seeking to enforce her rights under the tort of nonfeasance against the defendants.

The Alleged Loss Suffered By The Plaintiff Is Not Caused By The Defendants

[79] The defendants also argued that the remedies sought by the plaintiff in the instant suit – that the first defendant committed the tort of nonfeasance in public office, and the others being vicariously liable, as well as general, aggravated and exemplary damages – are not related to plaintiff's action against the defendants. This is because the losses suffered by the plaintiff

A resulted from Pathmanathan's action since he refused to surrender PD after he had taken her with him as early as in 2010. The plaintiff pleaded that the failure of the defendants to execute the *mandamus* order has directly or indirectly enabled Pathmanathan to evade capture and that she has suffered pain and anxiety as a result of constant worry over the safety of PD. The B defendants alleged that there must be a causal link between plaintiff's cause of action against a defendant and the injury or loss suffered, with the defendant's action leading to the losses sustained by the plaintiff.

[80] To the extent that the *mandamus* order does not extend to the execution of the recovery order for the reasons enunciated by the Federal Court C referred to earlier, there is strictly no duty on the part of the first defendant to recover PD. The plaintiff cannot therefore claim that the loss suffered out of the separation from her youngest daughter was a result from the defendants' alleged inaction. The causal connection between the plaintiff's cause of action against the defendants and the loss suffered by plaintiff and D the remedies sought is missing.

[81] It is erroneous to contend that there is no causal link between the remedy sought by the plaintiff against the defendants and the tort claimed to have been committed by them. PD was taken away in 2010. That had then obviously nothing to do with the defendants. But the issuance of the E committal order (and recovery order) and subsequently the *mandamus* order have since brought the first and second defendants into the picture. Other than a mother's constant worry for her daughter's safety, health and well-being, such is also inextricably affected by the fact that Pathmanathan has not yet been apprehended by the defendants for more than a decade.

F **[82]** There is a nexus between Pathmanathan being at large and concerns on the part of her mother of PD's safety and well-being as the child who had been taken away by her father, the very incident which defines the entirety of the rest of the instant suit. It cannot therefore be said that the plaintiff's assertion that if not for the alleged failure of the first defendant to arrest G Pathmanathan, the plaintiff would not have still been suffering the absence of PD and not have her back, to be without basis. This cannot be a reason to have the claim struck out, even if it appears weak to the defendants. And I should again emphasise that it goes without saying that the onus is on the plaintiff to adduce evidence to prove her case.

H **Concluding Observations And Decision**

[83] I cannot therefore but conclude that there is nothing so obviously or so conspicuously unsustainable about the pleadings of the plaintiff, even when affidavit evidence is examined for the purposes of limbs (b) and (d) of O. 18 r. 19(1) as relied on by the defendants in this striking out application. I There is nothing frivolous, scandalous or vexatious about them, nor would

they amount to an abuse of process. Certainly with such findings and given the facts in disputes, this case is one which is far from being a plain and obvious case, and which is accordingly entirely unsuited for summary disposal by way of striking out under O. 18 r. 19(1) of the RC 2012.

[84] On the contrary, the plaintiff could potentially suffer great prejudice if her claim herein was struck out sans the opportunity to ventilate her case in a trial with the presence of witnesses and the production of documentary evidence which would then help shed light on issues by all litigants. I must also state that it cannot be emphasised enough that the court is especially mindful that every Malaysian citizen has a constitutional right of access to justice under art. 5(1) of our Federal Constitution (see the Federal Court case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507), and the effect of striking out a pleading is to completely deprive a plaintiff from having his or her day in court (see another decision of the Federal Court, in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLRA 175).

[85] In view of the foregoing analysis, I find that the defendants have not successfully established their case for the striking out and failed to satisfy this court that a striking out of the suit is justified. This striking out application is therefore dismissed, with costs.